IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK C. ROBERTSON, Plaintiff in Error,

vs.

BLAINE COUNTY, Defendant in Error.

In Error to United States Circuit Court for the District of Idaho.

BRIEF OF PLAINTIFF IN ERROR.

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Statement.

This action was begun in the Circuit Court for the District of Idaho on the 30th of September, 1897. A demurrer to the complaint was sustained and thereafter the amended complaint was filed and a like demurrer being filed thereto, on the first day of March, 1898, the cause came on for argument, was heard and submitted. The Court sustained the demurrer and ordered judgment for defendant, which was thereupon made, rendered, and entered.

There appears on pages 34 and 35 of the record a motion to strike out the amended complaint; but, as appears on page 35 of the record, this motion was withdrawn by defendant.

It will also be noted that the Court below, on sus-

taining the demurrer to the original complaint, made and filed its opinion (p. 22 of record), and that afterwards the amended complaint having been filed, and the same demurrer having been interposed thereto, and having been argued and submitted, the Court made the same decision as before and on the same opinion, stating: "It is not found that the amendments to the complaint justify a change * * " (Record, p. 32.)

To the order sustaining the demurrer and to the decision and order for judgment the plaintiff then and there duly excepted; the exceptions were allowed, and made part of record, and were also preserved in a bill of exceptions then and there settled and allowed and made part of record. (Record, pp. 66, 67, 68, 69.)

The proceedings are brought here for review on writ of error.

Questions Involved.

This action is for the collection of a claim based upon a portion of a bonded debt of a county, incurred for the purpose of raising a fund to build a court house and jail.

To the complaint the defendant interposed a general demurrer, and also Section 4052 of the Revised Statutes of Idaho, (Record, pp. 61. 62.) which section, in prescribing the time within which suits may be brought, reads as follows:

"Sec. 4052. Within five years: An action upon any contract, obligation, or liability founded upon an instrument in writing."

The position of the defendant on the demurrer was, that as this bonded indebtedness all became due November 1st, 1891, the above section applied, and the

cause of action was barred; and the Court below was of that opinion.

Plaintiff in error contends that the above provision of law does not apply:

First. Because the duty of providing for and paying this debt was so imposed and assumed as to make the debtor county the donee of a power and a trustee of a direct, express, and continuing trust, unaffected by the statute of limitations.

Second. Because the act authorizing and requiring the creation of this debt provided for the levy of a special tax and created a special fund, which tax was never levied and which fund never contained any moneys; nor was any money ever in the treasury of the debtor county applicable to the payment of this debt.

Third. Because of new promises; of renewal of the indebtedness; of many subsequent acknowledgments of the debt; and because of the creation of a new legislative obligation and debt upon the defendant county, based upon the original debt, and into which the original debt is merged.

Fourth. Because, of the new promises and acknowledgments embraced in and implied in legislative acts and legal proceedings thereunder; of the making provision for the payment of said indebtedness; of the apportioning the same and creating legislative debts upon other counties than the debtor county to aid the debtor county in the payment of the same.

Fifth. Because of statutory provisions requiring a new county to pay its proportionate share of any bonded indebtedness outstanding against the parent county and requiring such payments to be used only in aid of paying such bonded indebtedness; and be-

cause of various acts, suits and proceedings done, instituted and undertaken by the debtor county to secure aid from other counties in obtaining funds on account of and for payment of this indebtedness.

Sixth. Because of the various acts of the Legislature regarding said indebtedness; regarding the county which created the same; regarding other counties created out of said county; regarding the funding of the indebtedness; regarding the apportionment of the indebtedness; and because of acknowledgments and promises made and necessarily implied in various suits, actions, and legal proceedings had and taken concerning said indebtedness by the defendant county, and the results of the same, as appears in the history of said indebtedness.

History of Indebtedness.

The county creating this indebtedness and issuing its negotiable coupon bonds therefor, was Alturas County, in the then Territory of Idaho. It was authorized and required so to do by an act of the Legislative Assembly of Idaho, approved February 8, 1883, and entitled "An act providing for the erection of a court house and jail at Hailey, the county seat of Alturas County."

Special and Local Laws of Idaho, Secs. 421 to 427, pp. 106 to 108.

Record, p. 37.

Sub Sec. 5 of said act provides as follows: "The Board of County Commissioners of said county shall, at time of the levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due. And the

tax so levied shall be known as the Court House Bond Tax, and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose. And for the payment of said bonds, principal and interest, all the taxable property of said county is hereby pledged." (Record, p. 38.)

Alturas County at that time embraced an area of 15,120 square miles, had a voting population of 3,500 male electors, and an assessed valuation of $2,871,-365.57.

The assessment of the county for the year 1888 shows a valuation of the county of $3,837,362.06.

After March 7th, 1889, Alturas County was, by divisions, left with an area of 3,652 square miles of mountain peaks and lava flats and was so nearly destroyed as to have, in 1894, an assessed valuation of but $635,561.76, and a voting population of only 576 electors, yet with an indebtedness of 70 per cent. of the actual value of its assessable property.

Record, pp. 49, 55 and 56.

Act dividing Alturas County, see Idaho Session Laws 1888-9, p. 35.

This division of Alturas County, in February, 1889, was so near its destruction that from that time during all its subsequent existence it made no attempt to raise any funds or to do anything towards the payment of its indebtedness; claimed to be unable to do so; and with such claim, and on account of such inability, asked that the county be abolished and that a new county be created out of its former territory and embracing sufficient of its former territory (that

is, its territory before said division), to enable it to pay this and its other indebtedness. (Record, p. 56.)

Meantime, the legality of the division act of 1889 was disputed by Alturas County and was finally determined by the Supreme Court of the United States in Clough vs. Curtis, 134 U. S., 361 (10 Sup. Ct. Rep., 573), on March 17, 1890.

Consequently, and pursuant to the request of the county, the Legislature of Idaho, on the 3d day of March, 1891, passed an act "creating Alta and Lincoln Counties," legislating Alturas County out of existence, giving all of its property and territory to Alta County, and also giving to Alta County over half of what had been the County of Logan, providing that the county seat of Alta County should be at Hailey; and section 7 of said act provided as follows: "All public buildings, records, books, furniture, money, real estate and personal property heretofore belonging to Alturas County shall become the property of Alta County."

Section 9 of said act provided: "All the indebtedness of Alturas County shall be assumed and paid by Alta County."

Session Laws of Idaho 1890-91, p. 120.

The Supreme Court of Idaho, on June 3, 1891, declared said act unconstitutional, on the ground that its purpose, object and effect was to give to Alturas County a portion of Logan County without complying with the constitutional requirement of a vote of the people in the segregated portion.

People vs. George, 2 Idaho, 814.

The above case was finally determined on rehearing

on September 16, 1891, the decision previously rendered being adhered to.

People vs. George, 2 Idaho, 847.

From 1889 down to 1894 Alturas County and the other counties which had been created out of her territory and were by said division act of 1889 required to aid her in the payment of this indebtedness, did nothing towards paying, adjusting, apportioning, or in any manner providing for this indebtedness, as Alturas County was dissatisfied with the provisions for the apportionment provided by the act, and refused to take any steps to make apportionment or allow the same to be made until August 4, 1894, when she and the other counties were commanded by the Supreme Court of Idaho to make such adjustment and apportionment as they were directed to make by the said division act of 1889. (Record, pp. 50, 51.)

Elmore County et al. vs. Alturas County, 37 Pac., 349.

Afterwards and in 1894, the apportionment of the indebtedness of Alturas County was made, and, as made and filed of record in the office of the Recorder of Alturas County, left with Alturas County the obligation of the payment of all of this bonded court house debt, and the same was thereupon assumed and acknowledged by Alturas County as her proper indebtedness. (Record, p. 51.)

On March 9, 1895, the Legislature of Idaho, recognizing the fact that great delinquencies existed as to payments on the apportioned old Alturas debt, passed an act headed, "Apportionment of old Alturas debt," which act amended Section 8 of the said division act of

1889, and, among other things, provided that "In case there shall, by said counties or either thereof at any time be an ommission for any cause to levy the aforesaid taxes or any thereof, it shall be the duty of the of the Boards of County Commissioners of the counties, or county, so omitting to make such levy to ascertain the amount of arrearages of principal and interest then due, and in addition to the amount levied for the payment of the interest then accruing to levy each year a tax for such additional sum as will pay one year's arrearage of interest, or principal, or both, beginning with the first year that said interest, or principal, or both, become delinquent and upaid, and shall continue to levy a similar tax each year and every year until all the arrearages of interest and principal shall be fully paid: *Provided*, that if any of said counties shall so desire they may refund all of said arrearages of interest and principal by the issuance of interest bearing coupon bonds therefor, payable in not less than ten (10) or more than twenty (20) years from the date of issue, bearing interest at not exceeding six (6) per cent. per annum; said bonds to be issued in pursuance of law."

Idaho Session Laws 1895, p. 87.

Said Section 8 before amendment, and now as amended, provided and provides that the moneys received from the new counties shall be "applied only to the payment of the present indebtedness of Alturas County, and the securities into which it has been funded," of which this claim is a portion.

By an act of the Legislature passed March 5, 1895, Alturas County was legislated out of existence, and the defendant county created, with a territory of

9,520 square miles, and with a voting population of 1,800 male electors, and an assessed valuation of $2.410,688.72. This act provided that "All valid and legal indebtedness of Alturas and Logan Counties shall be assumed and paid by Blaine County."

Idaho Session Laws 1895, p. 31.

Record, p. 52.

On the 8th day of March, 1895, the Legislature of Idaho passed an act "concerning funding and refunding county indebtedness," and amendatory of the general Idaho statute upon that subject.

Section 3606 of the Revised Statutes of Idaho, as amended by this act, provides as follows:

"Should any part of a county that has incurred a bonded indebtedness, be cut off, and annexed to another county, or erected into a new or separate county, the Assessor of the county to which the segregated portion is attached, or the Assessor of the new county created as aforesaid, shall upon notice from the Board of County Commissioners of the original county from which such segregated portion was detached, given at the regular session of the board when county and State taxes are levied, collect in said segregated territory, and in addition to the other taxes collected by him for county and State purposes, and at the same time and in the same manner, the tax levied by said Board of Commissioners as herein provided; and the laws of the State relating to the levy and collection of taxes, and prescribing the powers, duties and liabilities of officers, charged with the collection, and disbursement of the revenue arising from taxes, are made applicable to this act. The money collected by the Assessor as aforesaid, shall be paid over by the Treas-

urer of the county collecting it, to the Treasurer of the county losing the said territory, and for the purposes herein directed, but such segregated territory so attached to another county, or erected into a new county shall be relieved of the annual tax, levied as provided in the foregoing section, when the county acquiring the same, or the new or separate county pays to the county losing the territory that proportion of the whole indebtedness, together with legal interest thereon, that the assessed value of property in the segregated territory, bears to the assessed value of the property in the whole county, as constituted before the division or segregation thereof."

Session Laws Idaho 1895, Sec. 3606, p. 59.

On March 9, 1895, the Legislature of Idaho passed an act "To annex a part of Blaine County to Custer County," Section 2 of which act provided "that the part of the territory herein proposed to be stricken off from Blaine County shall be held to pay its relative proportion of all the liabilities of said Blaine County existing at the time the vote on such division shall be canvassed and the result officially declared by the Commissioners of Custer County."

Idaho Session Laws 1895, p. 142.

On March 18, 1895, the Legislature of Idaho created out of a portion of the County of Blaine the County of Lincoln, cutting off from Blaine County about 2,600 square miles of territory, taking 525 of its voting population, and about $990,000 of its assessed valuation, thereby leaving to Blaine County a territorial area of 6,920 square miles, a voting population of 1,275 male electors, and an assessed valution of $1,410,000.

Idaho Session Laws 1895, p. 170.

Record, pp. 53 and 54.

Said act creating Lincoln County provided that it should hereafter, and in ten annual installments, pay its proportionate share of the indebtedness of Blaine County, including said court house bonded indebtedness, but it gave to Lincoln County no portion of or interest in the resources of or moneys due to said Blaine County, amounting at that time to the sum of $130,000.

Since the creation of Lincoln County such proceedings have been had that Blaine County has recovered a judgment against Lincoln County for its proportion of said indebtedness, including said court house bonded indebtedness, for the sum of $238,446.27, besides interest from the 18th day of March, 1895, amounting to over $50,000.

Blaine County vs. Lincoln County, 52 Pac., 165.
Record, p. 58.

Lincoln County was by said act obligated to pay Blaine County nearly one-half of said court house bonded indebtedness. This has been claimed by Blaine County of Lincoln County and judgment for the same has been awarded in said action to Blaine County since the bringing of this action, but before the filing of the amended complaint.

Lincoln County has not yet paid to Blaine County any portion of the debt legislated upon it in favor of Blaine County (including said court house bonded indebtedness), and when the same is paid the said act provides that the moneys received from Lincoln County shall be used for no other purpose by Blaine County except for the discharge of the said inherited indebtedness of Blaine County, including said court house bonded indebtedness. (Record, p. 59.)

We quote from Section 7 of said act: "The money so received by Blaine County, shall be by it applied only to the payment of the present indebtedness of Blaine County and the securities into which the same is funded."

And Section 8 of said act provides: "The Treasurer of Blaine County must apportion to the credit of said redemption fund all moneys received by him from Lincoln County in payment of warrants herein provided for, and pay the same out only for the redemption and payment of outstanding indebtedness of Blaine County or the securities into which it has been or may be funded or refunded."

Idaho Session Laws 1895, pp. 173 and 174.

Bingham County not having paid over to Alturas County or to Blaine County its proportionate share of the indebtedness of old Alturas County, under the provisions of the division act of 1889 (which, when paid, could only be used in payment of indebtedness, including this court house debt), it was ordered so to do by the Supreme Court of Idaho, on March 13, 1897.

Blaine County vs. Smith et al., 48 Pac., 286.

After the creation of Lincoln County, Blaine County and Lincoln County proceeded, by accountants, to apportion the indebtedness of Blaine County between the Counties of Blaine and Lincoln. These accountants were appointed in April, 1895, and entered upon their duties for the adjustment of the indebtedness in May, 1895, at Hailey, the county seat of Blaine County. They were, among other things, to adjust all the indebtedness of Alturas County which had been assumed by and legislated upon Blaine County, in-

cluding said court house bonded indebtedness, and in these proceedings Blaine County put in for adjustment the said court house bonded indebtedness, and the same was allowed by the accountants, and their report, filed in June, 1895, with the Auditor of Blaine County and the Auditor of Lincoln County, required Lincoln County to pay Blaine County a large portion of the same to aid Blaine County in the payment of its said indebtedness.

Blaine County rejected the findings of the accountants, and by resolution of its Board of County Commissioners, made and entered on the 15th day of August, 1895, authorized competent accountants to make examinations and computations and a report that would show the actual amount, and the basis for the same, due from Lincoln County to Blaine County as its proportion of said indebtedness. Under this order and appointment a report was made and filed of record with the Auditor of Blaine County, and was made the basis of that certain action wherein Blaine County was plaintiff and Lincoln County was defendant, which action was brought by Blaine County, October 18, 1895, and finally determined by the decision of the Supreme Court of Idaho February 25th, 1898.

52 Pac. Rep., 165.

Record, pp. 58, 59.

In the report made for and by the order of Blaine County, and in the complaint filed in said action of Blaine County against Lincoln County, Blaine County demanded to have apportioned, as a debt which she had assumed, the "Alturas court house bonded indebtedness," specifying by number and proper description the identical bonds and coupons, the basis of the

amount herein demanded; and the same was allowed by the Court and included in the judgment rendered in said act, and now held by Blaine County against Lincoln County. (Record, p. 58.)

The question of the legality of legislating this old Alturas indebtedness upon the people of that portion of Blaine County which had been Logan County was litigated, among others, in the actions brought to test the validity of the act creating Blaine County, and decided by the Supreme Court of Idaho in those actions, respectively entitled:

Wright vs. Kelly et al., 43 Pac., 565, Dec. 31. 1895.

Bellevue Water Co. vs. Stockslager, Judge, 43 Pac., 568, Dec. 31, 1895.

Blaine County vs. Heard, Probate Judge, like decision.

Blaine County vs. Martin, Clerk, like decision. Record, p. 59.

It is of the political and judicial history of Idaho that since the division act of 1889, which nearly destroyed Alturas County and left, with little aid from the new county, the vast indebtedness created prior to 1889 upon what remained of the old county, that there began and continued incessant litigation and constant appeals to the Legislature and to the courts for relief. The division act of 1889 was tested in four suits in the District Courts of the Territory, two in the Supreme Court of the Territory, and two in the Supreme Court of the United States.

There was refusal, over five years' delay, and there were two suits in the Supreme Court of the State in getting any adjustment on the apportionment made by that act. There have been in the State Courts four

separate and distinct actions concerning the indebtedness of old Alturas County; also four in the Federal Courts concerning the same matter, in one of which His Honor Judge Gilbert presided. (Savings and Loan Ass'n vs. Alturas Co., 65 Fed. Rep., 677.) Two actions were pending in the Federal Court at the time Alturas County was abolished, and three in the State Courts.

Before every Legislature since 1889 bills and measures of relief for the insolvent Alturas County have been pressed, and two Legislatures have passed bills abolishing the county and creating one large enough to assume and carry the burden, and these legislative acts have been followed by six actions finally determined by the Supreme Court of the State of Idaho, and many other suits and legal proceedings, and legislative and political actions, all because of a large debt left upon a weak county, until finally the Blaine and Lincoln acts, and the funding and apportioning acts, passed in 1895, have stood the judicial test and are adjudged law. The purpose, object and effect of the creation of Blaine County was to make a public corporation able to bear this burden of debt and to place the debt upon it.

And in the subsequent act creating Lincoln County care was taken not only not to weaken but to strengthen the debt-paying power of Blaine County.

Of all this history, courts in the District of Idaho will take judicial knowledge, as it is legislative, judicial, political and governmental.

Specifications of Error.

The plaintiff in error will rely upon the following errors:

1. The Court erred in sustaining the demurrer to the amended complaint.

2. The Court erred in sustaining the demurrer to the amended complaint, either for the reason that the amended complaint does not state facts sufficient to constitute a cause of action, or for the reason that the action is barred under the provision of Section 4052 of the Revised Statutes of Idaho.

3. The Court erred in sustaining the demurrer to the amended complaint and ordering judgment in favor of defendant and against the plaintiff.

Argument.

Plaintiff contends that for many reasons this action is not barred, and that if any of these reasons is good and sufficient, then the judgment should be reversed.

We shall endeavor to present these reasons both in their order, singly, each as a sufficient ground, and then also collectively, all as a single ground in their operation and effect.

First, then. The statute of limitations has never commenced to run against this claim, because the law under which the bonds were issued and which entered into the contract pledged all the property of the county for the payment of this bonded debt and created a special fund and provided for the levy of a special tax, to be known as the court house bond tax, to be used for the payment of this indebtedness and for no other purpose; and provided no other means of payment.

Record, pp. 37 and 38.

The county has the pledged property and is the

trustee of the direct, express, continuing trust, and the donee of the power and obligee of the duty to set such governmental wheels in motion as will place in the hands of the County Treasurer this special trust fund to pay this debt; and until that is done the statute of limitations does not begin to run.

The statute authorizing the issue of the bonds provided that "the Board of County Commissioners of said [Alturas] county shall, at the time of levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due. And the tax so levied shall be known as the Court House Bond Tax, and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose."

Special and Local Laws Idaho, Sec. 425, p. 107.
Record, p. 37.

The above provision, relating to the special tax and special fund, in the law authorizing the issue of the bonds here in suit, became and is a part of the contract between the county and the bondholders.

Van Hoffman vs. Quincy, 4 Wall., 535.
Mobile vs. Watson, 116 U. S., 289.
Bates vs. Gerber, 22 Pac., 1115-1116.
Ralls Co. vs. U. S., 105 U. S., 733.
Basset vs. City of El Paso, 30 S. W., 893.
Siebert vs. Lewis, 122 U. S., 284.

The authority to tax for the payment of municipal liabilities is in the nature of a trust; the power given becomes a trust which the donor cannot annul and the donee is bound to execute; and the separate fund

to be realized from the taxes levied will constitute a special trust fund.

Morgan vs. Beloit, 7 Wall., 613-618 and 19.
Van Hoffman vs. Quincy, 4 Wall., 535-554 and 5.
Lincoln Co. vs. Lunning, 133 U. S., 529-533.
Parish vs. City, 17 So., 823-824.
Maenhaut vs. New Orleans, 16 Fed. Cases, p. 377 (Case No. 8,939.)

"The law is well settled that the trustee of an express trust cannot invoke the statute of limitations against the *cestui que trust* until he has done some act in open violation or in disaffirmance of the trust."

2 Perry on Trusts, Sec. 863, p. 511.
Lemoine vs. Dunklin Co., 38 Fed., 567-568.
Custer vs. Murray, 5 Johns Ch., 522-531.
Lewin on Trusts and Trustees, p. 580, *p. 729.
Oliver vs. Piatt, 3 How., 411.
Lewis vs. Hawkins, 23 Wall., 119.

The complaint shows that there was no repudiation or renunciation of the trust and no refusal to pay except for want of the trust fund until just before the bringing of this action.

Record, pp. 46 and 47, 58 and 59.

The county, in levying such tax, in receiving and disbursing such tax moneys, acts as a trustee, and "it is a famaliar rule that the trustee of a direct trust, when sued by the beneficiary, cannot interpose the defense of the statute of limitations."

Board of Com'rs vs. Rush, 3 N. E., 165.
State vs. Board, 90 Ind., 359.
Board of Trustees vs. District, 7 S. W., 312.

Underhill vs. Senora, 17 Cal., 172–178.
Parish vs. City, 17 So., 823–824.

The act of 1883 authorizing the issue of the bonds and requiring the levy of the special tax and providing for the placing of the tax in a separate fund, clearly indicates the intention of the Legislature that the power granted should be exercised. In such case "courts will not allow the trust to fail or be defeated by the refusal or neglect of the trustee to execute the power, nor will it be allowed to fail because of any omission of the trustee."

2 Perry on Trusts, Sec. 473, p. 2.

"The office of a trustee is important to the community at large and frequently most so to those least able to take care of themselves. It is one of confidence. The law regards the incumbent with jealous scrutiny, and frowns sternly at the slightest attempt to pervert his powers and duties for his own benefit."

U. P. R. R. Co. vs. Durant, 95 U. S., 576.

The complaint shows that the defendant county, as well as Alturas County, has wholly failed, omitted and neglected to execute the trust imposed and appointed by law.

Record, pp. 47 and 48–56.

Under the law the bonds and coupons here involved were payable out of a particular fund, and, as appears by the complaint, such fund was never provided by the debtor county, although the Legislature has repeatedly recognized and enacted statutes looking to the placing of money in that fund.

Record, pp. 47, 50, 52, 54, 57, 58, 59.

Taxes such as here under consideration, "always constitute a separate fund."

State vs. Townsend, 11 S. W., 747.

"It is a general rule that when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued."

Sawyer vs. Colgan, 102 Cal., 283–292.
Lincoln County vs. Lunning, 133 U. S., 529.
Davis vs. Board, 45 Pac., 982–983.
1 Wood on Lim. (2d Ed.), p. 363.
Underhill vs. Sonora, 17 Cal., 172.
Freehill vs. Chamberlain, 65 Cal., 603–604.

The duty of providing this fund was a continuing one, and "until it was performed the statute of limitations would not apply."

Spaulding vs. Arnold, 26 N. E., 295–297.

To same effect is

City of Atchison vs. Leu, 29 Pac., 467–468.

"When a trust is to be effected by the execution of a power, then the trust and the power become blended and binding upon the donee of the power."

Greenough vs. Willis, 10 Cush., 571–576.

Where a power is coupled with a trust "it is considered a trust for the benefit of other parties" and then "the power becomes imperative and must be executed."

1 Perry on Trusts, Sec. 248, p. 330.

"In addition to the ordinary mode of creating trustees, they may be appointed by special act of the Legislature for the purpose mentioned in the statute creating the trust."

Wood vs. Board of Supervisors, 2 N. Y. S., 369-374.

Board vs. District, 7 S. W., 312.

The act of February 8, 1883, itself authorizing the issue of these bonds and directing the levy of the special tax and creating the special fund to pay them (Record, pp. 37, 38); the act of 1889, dividing Alturas County and expressly requiring the territory detached from Alturas to pay certain moneys to Alturas to apply on this debt (Record, pp. 49, 50, 51); the act of March 8, 1895, amending the general statutes relating to the levy and collection of certain taxes in new counties to pay the debts of the old or parent counties where new counties were created; the act of March 9, 1895, for the "apportionment of the old Alturas debt" and requiring certain counties formerly detached from Alturas to aid in paying the interest and principal of said debt (Record, pp. 50, 51); the act of March 18, 1895, creating Lincoln County out of a part of Blaine County and requiring Lincoln to pay a proportionate part of this debt (Record, pp. 53, 54), were each "equivalent to a trust deed, * * setting apart property out of which the money due was to be paid at a given time."

Underhill vs. Sonora, 17 Cal., 172-178.

People vs. Bond, 10 Cal., 563-571.

People vs. Morse, 43 Cal., 534.

On March 5, 1895 (Record, p. 52), Blaine County

was created and was made liable for the debts of Alturas; three days subsequently an act was passed amending the general law of Idaho "concerning funding and refunding county indebtedness." Ten days after the passage of this amendment Lincoln County was created out of a portion of Blaine, which then owed this bonded indebtedness, and was obligated to pay a ratable proportion of the liabilities of Blaine.

Record, p. 53.

The amendment amending the general law of Idaho "concerning funding and refunding county indebtedness," passed March 8, 1895, requires that the moneys collected in newly created counties on account of taxes levied to pay a proportionate part of the indebtedness of the old or parent county, "shall be paid over by the Treasurer of the county collecting it, to the Treasurer of the county losing the said territory, and for the purposes herein directed." (Quoted in full *supra* as Sec. 3606.)

Idaho Sess. Laws 1895, p. 59.

This amendment of the general law, passed prior to the creation of Lincoln County, was binding upon her. By the terms of the amendment not only was Lincoln County required to pay a ratable proportion of the debts of Blaine County, from which she had been detached, but the amendment authorized Blaine County to fix the tax levy necessary to pay interest and principal of her debts, and Lincoln, within her borders, was required to collect the tax so levied and pay the proceeds to Blaine, by whom such proceeds were to be applied to "the payment of her bonded indebtedness, and to no other purpose;" and the power and duty

thus legislated upon the parent county created a trust.

The act of March 9, 1895, relating to the "Apportionment of old Alturas debt," among other things, after providing for the apportionment of the debts of old Alturas County and requiring the several new counties each to pay to Alturas County in warrants its proportionate part of the old Alturas debt, provides: "The money so received from the Counties of Elmore, Logan and Bingham by Alturas County shall be by it applied only to the payment of the present indebtedness of Alturas County and the securities into which it has been funded." And the amendatory act then further provides: "The Boards of County Commissioners of the above named counties shall * * levy also a special tax * * in an amount sufficient to pay the interest on said warrants, and the County Assessor of each of said counties shall pay the amount of said tax to the County Treasurer of Alturas County each year in time * * to meet the payments of interest on the funded debt of said county, as the same shall become due. The Board of County Commissioners of each of said counties * * shall also * * levy a special tax sufficient to pay the principal of said warrants when the same shall become due, * * and year by year shall pay the amounts of such taxes to the County Treasurer of Alturas County, until all of said warrants are paid."

The amendatory act then makes provision for the levy of taxes or the issue of bonds to pay arrearages of interest or principal then or thereafter due, and continuing, says: "All money arising from the collection of taxes or the sale of bonds for the purpose of paying arrearages of principal and interest on said warrants

shall be paid over to the Treasurer of Alturas County in time to enable said county to pay the proportion due from each of said Counties of Logan, Elmore and Bingham upon said funded debt of Alturas County."

Idaho Session Laws 1895, pp. 87, 88 and 89.

Section 5 of the act creating Lincoln County, passed March 18th, 1895, reads: "The indebtedness of Blaine County must be apportioned between the Counties of Blaine and Lincoln in the same ratio that the property of said counties bears to each other and the territory hereby stricken off and erected into the County of Lincoln must be held to pay its ratable portion of the existing liabilities of the County of Blaine from which it is taken."

Idaho Session Laws 1895, p. 171.

Now we again call attention to the fact that at that time, to wit, March 18, 1895, even if there had been no trust relation till then existing between the county and the holders of the Alturas County secureties: even if no acknowledgment or new promise had been made respecting and affecting the Alturas debt, the statute of limitations had not run against the debt here under consideration and which, on the face of the contract, matured November 1st, 1891, only about three and one-third years previously.

It is admitted that at the time Lincoln County was erected out of a part of Blaine. the Court House Debt formed a part of the "valid and legal indebtedness" of Alturas County, which, in the language of the learned District Judge, the Legislature recognized "Blaine should pay."

Record, p. 26.

By the Lincoln County act, on March 18, 1895, the Legislature, in express terms, provided a special trust fund, composed of the moneys received from Lincoln by Blaine, which was sacredly set apart for "the payment of the present indebtedness of Blaine County."

But by the terms of Section 7 of the act it was provided: "Said [County] Commissioners must cause warrants to be issued by the Auditor of Lincoln County in favor of Blaine County to the full amount of the ratable proportion of the indebtednes of said Blaine County, as ascertained and determined in the manner hereinbefore described. Said warrants shall be drawn in sums of not more than five hundred dollars each; shall bear interest at the rate of seven per cent. per annum, from the date of the passage of this act until paid; shall be drawn against a fund to be called 'The Blaine County Redemption Fund,' and shall be registered by the County Treasurer of Lincoln County and be by him delivered to the County Treassurer of Blaine County and must be redeemed by Lincoln County in the following manner: Ten per cent. of the total amount shall be paid in eight years from the date of issue and ten per cent. annually thereafter until all of said warrants are paid. * * * The money so received by Blaine County, shall be by it applied only to the payment of the present indebtedness of Blaine County and the securities into which said debt is funded."

Idaho Sess. Laws 1895, p. 173.

Record, pp. 53, 54.

This provision, at least to the extent of Lincoln County's proportionate part of the debt which Blaine was at that time liable to pay. expressly establishes a

special trust fund, designates the trustee and states the object or purpose of the trust. How apt are the words of the Supreme Court of California in discussing a situation practically identical with that here presented:

"For this purpose a commission is organized; a trust, a trust fund and and trustees were specially created. * * * We consider the act * * * as substantially a trust deed whereby she [City of San Francisco] agrees, on a valuable consideration, to place in the hands of certain trustees so much of her revenue and property, to be applied by the trustees to the redemption of her obligations."

People vs. Bond, 10 Cal., 563.

See also People vs. Morse, 43 Cal., 534.

To quote the language of the Supreme Court of the United States, we say: "It [the act of 1877] provided as it were a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait."

Lincoln County vs. Lunning, 133 U. S., 529-533.

And in this connection we would further say with that Court: "When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

Ib.

Alturas County was, under the act authorizing the issue of the bonds, the original donee of the power to tax and was the first trustee under the act. Alturas

County was abolished and Blaine County was erected instead and was made successor, in ownership of all the property, etc., of Alturas County, and in liability of the obligations of Alturas.

Act of March 5, 1895—Idaho Ses. Laws 1895, p. 31.

Blaine became *eo instante* bound to execute the requirements of the trust.

It is a universal rule that all persons who take through or under the trustee shall be liable to the execution of the trust, and become trustees for the original beneficiary.

Lewin on Trusts & Trustees, p. 279, *p. 270.
2 Pomeroy Eq. Jur., Sec. 1048.
Oliver vs. Piatt 3 How., 333.

There seems to be a marked distinction observed by the courts when considering the matter of trusts, between those wherein only private rights are involved and those wherein the trust relation exists between individuals, on the one side, and the public on the other, in so far as the question of the statute of limitations affecting the trust is concerned.

When the relation is created by statute and the trustee is a public officer, when the duties imposed in the trust are to be performed by the agents of the public, the application of the rule is extended and the good faith of the public, of the State and its constitutent subdivisions is not permitted to be opposed or defeated by any neglect or omission in the performance of trust duties imposed on the officers who are empowered and required to execute the trust. Thus, where money was paid to a town to equalize bounties for soldiers, it was declared to be held in trust for them, and that the

statute of limitations did not run against them in an action to recover the same.

McGuire vs. Linneus, 74 Me., 344.

"These authorities * * show * * that it is not correct to affirm, as is sometimes done, that the statute never runs in the case of a trust. This statement is true of direct, technical trusts, *created by express law*, or by deed or will, but it is not true of implied trusts where there is concurrent equity and law jurisdiction."

Newsom vs. Board of Commissioners, 3 N. E., 163-165.

"The county, in receiving and disbursing school funds, acts as a trustee, and it is a familiar rule that the trustee of a direct trust, when sued by the beneficiary, cannot successfully interpose the defense of the statute of limitations. The trust in this case is a direct one, for the fund is set apart by positive law as a trust fund."

Board of Commissioners vs. State, 3 N. E., 165-166.

The learned District Judge, in the decision of the demurrer, says: "There certainly is nothing in it [the law] which prevented the holder of the bonds after November 1, 1891, from maintaining his action thereon: there never was any fund dedicated specially to the payment of these bonds, nor any special provision for their payment except the general one in the original act before referred to."

Record, p. 31.

We have endeavored hereinbefore to show that the

conclusions of His Honor, as to there being no specially dedicated fund nor any special provision for payment, expressed in the latter part of the above quotation, were erroneous.

Now, as to whether the holder of the bonds might have maintained his action "after November 1, 1891." True it is that an action might have been maintained so far as there was anything in the law "*which prevented*" his doing so. But the only purpose of instituting a civil action is to enforce or protect a right or to prevent or redress a wrong.

The institution and maintenance of an action is a vain proceeding in so far as it fails to furnish an adequate remedy.

Could the "holder of the bonds" have "maintained his action" at any time after November 1, 1891, in a manner that would have afforded him an adequate remedy? If he had sued the county in the State Courts upon the contract, what would have been the result?

Section 1735 of the Revised Statutes of Idaho provides: "Upon presentation to the Board of County Commissioners of a final judgment for money or damages, duly certified, against their county, the board must allow the same and direct its payment as other claims against the county are paid."

Section 2005 of the Revised Statutes provides: "The Auditor must draw warrants on the County Treasurer in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county, which have been legally examined, allowed and ordered paid by the Board of Commissioners."

Section 14 of Article VIII of the Constitution of

Idaho provides: "No money shall be drawn from the county treasuries except upon the warrant of a duly authorized officer, in such manner and form as shall be prescribed by the Legislature."

Had the holder of the bonds, then, before there was any money in this trust fund, prosecuted his action on the bonds to final judgment, the net result would have been a county warrant, issued to him, the payment of which would have been contingent upon the performance of their duties by all the county officers directly or indirectly connected with the levy, collection and payment of the money on this claim out of the trust fund, for the warrant could be drawn on no other fund. The judgment which would have been recovered by the holder of the bonds would have been valueless except as a voucher to authorize the commissioners to order a warrant drawn, and the warrant that would have been drawn could have been of no benefit until the officers levied and collected the necessary special tax and did all acts required to place the money in the trust fund. Under such conditions, judging from the neglect of the county and its officers to obey the law and make provision for the payment of the coupons and bonds themselves, it could hardly be expected that the circuitous course involved in the securing and enforcing the remedy provided by an action would lead to any result so satisfactory as that of waiting in reliance upon the oft-repeated promises of the Legislature, hereinbefore referred to, relative to the payment of these bonds.

An action for a mandamus against the County Treasurer could have been maintained only when there was money in his hands applicable to the pay-

ment of the bonds, and, as is shown by the complaint, that time has never been.

Record, p. 48.

State *ex rel.* Dickinson vs. Neely, County Treas., 9 S. E., 664–666.

An action for mandamus could have been instituted against the Board of County Commissioners to levy the tax authorized by law for the payment of the coupons and bonds in the State District Court in and for the debtor county.

The Supreme Court of California, respecting this matter, says: "This provisional office of levying the tax being a public duty in the officers of the corporation, cast upon them by the public law, carried with it a legal obligation to discharge it, which might doubtless have been enforced by appropriate proceedings."

Underhill vs. Sonora, 17 Cal., 173–178.

But if an action for a mandamus against the Board of Commissioners had been begun, through a policy of delay, by appeals and other proceedings, under the Idaho procedure, a long time would have necessarily elapsed before a writ could have issued.

Suppose the writ finally issued; the same tedious process would have been required to compel the collection of the tax, and another seige of litigation endured in compelling the payment of the tax as collected, into the treasury by the collector.

As is shown by the complaint, the county utterly failed to act in respect to meeting these obligations as the law directed; not only so, but the county, its people and its officers, felt that under the circum-

stances, with a restricted area, practically without taxable property, and deficient in population, the payment of a debt equal to 70 per cent. of its assessable property was an impossibility. (Record, pp. 51, 55, 56, 57.) There would undoubtedly have been concerted action of the officers, heartily seconded by every taxpayer, to defeat any attempt to enforce payment of the county debt. Mandamus would have been an inadequate remedy.

The words of the Supreme Court of California, in the later case of Freehill vs. Chamberlain, 65 Cal., 603-604, upon this very question, are perfectly in point here. The Court says:

"The contrary view would place it in the power of a municipality in many cases to avoid all payment of its debts, because, if by concert of action each officer should omit to perform his duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury. We do not think the Legislature intended such result."

Now, as to an action in the Federal Courts. The holder of these securities is not a citizen of Idaho, and in this action against a county of Idaho could invoke the aid of the Federal Courts in the enforcement of the obligations of the county.

Lunning vs. Lincoln County, 30 Fed., 749.
Lincoln County vs. Lunning, 133 U. S., 529.

But in order to set the county in motion for the collection of a tax to place money in the treasury for the payment of this debt by mandamus, a judgment for what is due must be first obtained on the debt. Mandamus does not issue out of the Federal Courts except

in aid of judgments therein rendered. This course the plaintiff is pursuing, and under the authorities and on principle we contend that the statute of limitations will not begin to run until the money is in the trust fund for the payment of the claim, because then, and not till then, he has a direct legal remedy by mandamus against the Treasurer to pay over this trust fund.

High on Ex. Remedies, § 36.
Day vs. Callow, 39 Cal., 593.
Rosenbaum vs. Bauer, 120 U. S., 45.

On page 31 of the Record the learned Judge takes the ground that no trust fund was created by the act authorizing and providing for the payment of this indebtedness, and regarding this law (authorizing the bonds) says: "If that is sufficient to constitute a special fund, or such an express trust as to avoid the operation of the statute, then, as before said, it is virtually a dead letter as to all municipal debtors, for every law authorizing the issue of bonds makes such general provision for their payment, and yet it has been often held that actions upon them become barred by neglect."

As to the danger of the statute of limitations becoming a "dead letter," we have to say, that as we understand the authorities the statute would begin to run when the money was in the trust fund, but not before, for then, and not before, mandamus for the direct payment of the money would lie, and till then no direct action or proceeding of any kind could be resorted to to enforce payment. But again, we note that the learned Judge not only calls the provision for the creation of the fund and for the payment of the debt

"general provision for payment," but says that "every law authorizing the issue of bonds makes such general provision for their payment."

Yet we know of no other law in the district of Idaho that makes just such and only such provision for the payment of any bonds issued thereunder.

Many acts under which bonds have been issued in Idaho, provide for payments of interest and principal of the bonds, out of any moneys in the treasury in case a special fund therefor has not been created, or, if created, is insufficient because of there being no money therein, when payment is due.

As a sample of the class where no special fund was ever created, we cite Sections 11 and 12 of an act "Providing for the issuing and redemption of new bonds," approved January 8, 1875.

"Sec. 11. For the prompt payment of interest of the bonds issued under and by virtue of this act there shall be and is hereby, from and after the first day of December, A. D. 1875, and until the final redemption of such bonds, annually set apart and appropriated from moneys in the territorial treasury an amount sufficient to pay promptly the semi-annual interest on such bonds; and such sum, so set apart and appropriated shall be applied by the Territorial Treasurer exclusively to the payment of such interest on the presentation and surrender of the coupons as aforesaid.

"Sec. 12. From and after the first day of December, A. D. 1880, the Legislative Assembly of Idaho Territory shall by law provide for the setting apart of an annual sum from moneys in the territorial treasury

sufficient to meet the payment of the principal of said bonds at their maturity."

Special and Local Laws Idaho, p. 11, Secs. 17 and 18 (Sec. 11 and Sec. 12.)

As a sample of another class, we cite act of February 5, 1889, providing for the construction of a wagon road, and authorizing the issue of bonds therefor, Section 20 of which act is as follows:

"If at any time there shall not be sufficient moneys in said road fund to pay the interest coupons or the principal of such bonds when due, the Territorial Treasurer shall pay the same out of the general fund of the Territory, and shall replace the amount, so paid, out of the road fund whenever moneys intended for said fund shall be received."

Idaho Sess. Laws, 15th Sess., 1889, p. 31.

As a further example of this class, we cite the act of Feb. 2d, 1885, providing for the erection of a capitol building. Section 7 thereof provides a special fund, out of which the bonds are to be paid, but Section 8 provides: "Sec. 8. If at any time there shall not be sufficient moneys in said capitol building fund to pay the interest or the principal of such bonds when due, the Territorial Treasurer shall pay the same out of the general fund of said Territory, and shall replace the amount so paid out of the fund last named, whenever moneys derived from licenses shall be received."

Special and Local Laws of Idaho, p. 17, Sec. 39, (Sec. 8.)

Another act of the same class is that of February 16, 1893, relating to a state wagon road. Section 18 there-

of provides a special tax, the proceeds of which shall constitute a "separate and distinct fund to be known as the road fund" (exactly like the law of 1883, providing for the bonds here in suit) but Section 19 thereof provides: "If at any time there shall not be sufficient moneys in said road fund to pay the interest coupons or the principal of such bonds when due, the State Treasurer shall pay the same out of the general fund of the State, and shall replace the amount so paid out for the road fund whenever moneys intended for said fund shall be received."

Idaho Session Laws 1893, p. 31.

And here we wish particularly to call attention to the fact that, as is shown by the extracts from the laws last above given, it is usual to provide a special fund, but almost invariably such provision is supplemented with another which requires that if for any reason the special fund has not in it sufficient money to meet the liabilities payable out of it when due, then as a further security to the creditor the general fund is made at once available for the purpose of promptly meeting the public obligations. Not so, however, is it in regard to the act authorizing the bonds here involved and providing for their payment. Here the creditor has the special fund and nothing else to look to. Here he must rely upon the faithful performance of duty by the trustee without having an alternative mode of getting his money provided in case the trustee is unfaithful to his trust.

Wherever money could be taken from the general fund, there mandamus would lie directly to the Treasurer in the first instance, for money is presumed to be there; but not so in case of a special fund.

New Debt Created by Statute.

Second: *New legislative debt.* When Blaine County was created there was legislated upon it an indebtedness. The creative act provides: "Sec. 7. All the valid and legal indebtedness of Alturas and Logan Counties shall be assumed and paid by the County of Blaine."

Session Laws Idaho 1895, p. 33.

That this Court House Bonded Debt was then of the "valid and legal indebtedness" of Alturas County is not questioned. This claim is a portion of the legislative debt created with and upon Blaine County. It is of the nature of a specialty and would be such whether created by statute or by operation of law.

Angell on Limitations, Sec. 80, p. 76, Title. Specialties.

Under the laws of Idaho the statute of limitations may run against a specialty, but it will begin to run not prior to the date of the creation of the specialty. Hence, we say, the legislative debt, the new obligation on Blaine County, the new debt, so far as the obligor is concerned, came into existence March 5, 1895, and if the statute of limitations has begun to run against it (which we deny, as there has been no money in the trust fund), it began to run March 5, 1895, the date of the creation of this legislative debt; and this is equally true whether it be a legislative debt, or whether it arose by operation of law, as in either case it is in the nature of a specialty.

Bullard vs. Bell, 1st Mason (Cir. Co.) R., 243.

This action may be regarded as not a suit upon a

contract made by the defendant, in which, at common law, *indebitus assumsit* would lie; but the obligation of payment is rather in the nature of a specialty at common law, where an action of debt would lie. There is a legal liability to pay a certain definite sum of money, independent of any promise on the part of the defendant, and "if there exists a duty sufficient to raise a promise, then it is sufficient to sustain an action of debt."

We quote from Van Hook vs. Whitlock, 3 Paige Chancery Rep., 409, from p. 416: "Whenever a statute imposes a legal obligation upon one party to pay money to another, the person to whom the payment is to be made may maintain an action for debt for the money."

"All valid and legal indebtedness of Alturas and Logan Counties shall be assumed and paid by the County of Blaine."

We contend that then and there, *eo instante* and *eo nomine*, what had been the valid and legal indebtedness of Alturas County and of which the bonds here under consideration formed a part, became a debt of Blaine County.

In name, *prima facie*, the bonds here in suit are not obligatory upon Blaine County, and aside from that statute of March 5th, 1895, there is nothing in terms fixing responsibility upon the defendant county for this debt. Against Blaine County, *eo nomine*, there is no liability here independent of the statute. But in terms by that act the debt was legislated upon Blaine County, *eo nomine*, and the debt so legislated upon her is a "liability created by statute." This action was begun within less than three years after this legislative debt was created.

"The indebtedness, if any, is one wholly created by statute. * * It was then and there the creation * of * * a legal obligation upon Yellowstone County to pay. * * The Legislative Assembly had the power to create and did create the indebtedness."

County of Custer vs. County of Yellowstone, 9 Pac., 586–590 and 91.

"It [the act of the Legislature] had the effect to impose a liability upon the new township. * * It was within the power of the Legislature to impose such a liability, and it was clearly its intention to do so."

Board vs Thompson, 61 Fed., 923.

"The debt was fixed by the Legislature."

Board vs. Board, 25 Pac., 508–510.

"The obligation to pay the debts of the district was imposed upon the town by a public law, * * and did not require any promise or consent of the town to give it effect."

Whitney vs. Stowe, 111 Mass., 368–372.

In a case involving the statute of limitations applicable to liabilities created by statute, the Supreme Court of California said: "The act first cited casts this duty of bringing suit on county claims on the District Attorney. This duty is not cast by contract, but by the law, and the same law provides the compensation, or, in other words, creates the liability upon the part of the county to pay the compensation. * * The liability may be said, therefore, to come exclusively from the statute—to be created by it."

Higby vs. Calaveras County, 18 Cal., 176–179.

"The Legislature, by that act, created a corporate obligation * * against Lake County; and as it provided no particular mode of enforcing it, it follows that an action at law is the proper remedy."

Grant County vs. Lake County, 21 Pac., 447–449.

"If the debts were actually due from the corporation at the time of its dissolution, it can make no difference whether they were due from the corporation by judgments, or specialty, or only by simple contract. *The right of action against the stockholders is founded upon the statute;* and the form of the action against them must be the same, whatever may be the nature of the original indebtedness of the corporation. * * The Revised Statutes require all actions of debt founded upon any contract, obligation or liability, not under seal, except such as are brought upon judgments and decrees, to be commenced within six years. This would embrace the present suit founded upon a *liability created by statute.*"

Van Hook vs. Whitlock, 3 Paige Ch., 409–415 and 416.

"The liability of sureties on an official bond is a statutory liability and an action upon such a liability is barred in three years."

Ada County vs. Ellis (Idaho), 48 Pac., 1071.

Revised Statutes, Sec. 4054, Subdiv. 1 (see quoted *infra*).

Canyon Co. vs. Ada Co., 51 Pac., 748–750.

"A swamp land assessment is a charge imposed * *

by authority of the Legislature, and is thus clearly a liability created by statute."

People vs. Hubert et al., 12 Pac., 43.

City and County of San Francisco vs. Jones, 20 Fed., 188.

Operation of Law.

Certainly the obligation of Blaine County to pay this indebtedness is either one created by statute, or is one which arose by operation of law, or by both.

Is it by operation of law independent of the statute? Blaine County, having come into possession of all the property, territory and population of Alturas County, would have been bound by the obligations of Alturas County by operation of law.

1 Dillon Mun. Corp., Secs. 171, 172, 173.

Mount Pleasant vs. Bechwith, 100 U. S., 514.

Broughton vs. Pensacola, 93 U. S., 266.

Mobile vs. Watson, 116 U. S., 289.

The Idaho statute of limitations does not in terms prescribe a period of limitation for actions for relief in cases where the right of action arises by "operation of law."

Now, if the liability of Blaine County were not one expressly "created by statute," and therefore subject to the three year limitation provided in Section 4054 of the Revised Statutes of Idaho, but is a liability arising by operation of law without being, in terms, created by statute, then the period of limitation applicable to the case would be that prescribed by Section 4060, which reads: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued."

Revised Statutes Idaho, Sec. 4060.

As we have before shown, if the act creating Blaine County had not specifically provided that Blaine County "shall assume and pay" all the valid and legal indebtedness of Alturas County, still, by operation of law, the liability for such indebtedness would have attached and Blaine would have been liable. If, then, this debt be considered one arising by operation of law and falling within the provisions of Section 4060, it is not barred for the reason that four years from the time Blaine was created had not elapsed when this action was commenced.

Section 4052 of the Revised Statutes of Idaho, interposed by defendant, does not apply, and the demurrer was therefore insufficient to raise the question of the statute of limitations in this action.

Section 4052 relates to limitations governing in cases of an "action upon any contract, obligation or liability founded upon an instrument in writing."

The section of the law governing the time for commencing an action upon a liability created by statute is Section 4054, which provides:

"Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

Relative to pleading the statute of limitations, the Revised Statutes of Idaho provide, Section 4213: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by Section ——(giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish on the trial the facts showing that the cause of action is barred."

Defendant having pleaded Section 4052, it is confined to that section, and no other section is pleaded.

Thomas vs. Glendenning, 44 Pac., 652.

Bank vs. Wickersham, 34 Pac., 444.

That the obligation of Blaine County to pay was neither one imposed by the legislative act, nor one arising by operation of law, seems to be the position of learned counsel for defendant. It seems to us that the defense, as its position is shadowed forth on page 26 of Record, does not distinguish between the obligation and the *nature* of the obligation; between the liability to pay a certain debt and the manner in which the liability was created. Blaine was to pay the same debt, but for a different reason. Her obligation arose in a different manner. The inception of the debt of Alturas was the making the contract; the inception of Blaine's obligation to pay was the legislative act. And counsel seems in this position to seek support in Section 8 of the act creating Blaine County, which provides that "All actions, prosecutions and legal proceedings of all kinds whatsoever, now pending in either Alturas or Logan County shall be continued, maintained and prosecuted in the new County of Blaine; all rights of action now existing in favor of, or against, said Alturas or Logan County, may be maintained in favor of, or against, Blaine County."

Idaho Session Laws 1895, p. 33.

It is contended that because Blaine must pay this claim, based on said bonded indebtedness, and because of the provision that "all rights of action now existing in favor of, or against, Alturas or Logan County, may be maintained in favor of, or against, Blaine

County," that therefore no new obligation has been created or has arisen and that Alturas County had a right, or partial right, to the defense of the statute of limitations which had been transferred to Blaine County by this provision.

As to the first phase of their conclusion, it seems to us they fail to distinguish between the obligation to pay and the debt to be paid, while the fact is there was a new obligor and a new obligation but an old indebtedness, or else a new debt into which the old idebtedness was merged.

As to the second phase of their conclusion, it seems to be based upon the idea that a debtor has a right to be sued within a certain time, instead of the fact that he has the privilege of objecting to be sued after the lapse of a certain time. The portion of the statute of limitations which is here pleaded relates to the remedy of the creditor and not to a right of the debtor or even to the debt itself; it may be a perfect bar to the creditor by taking away his remedy, and that is the extent of its operation.

The Court appears to have treated the period of time that had intervened between the date of the maturity of the bonds and the date of the creation of Blaine County as some kind of a right which would fall to Blaine as the successor in interest of Alturas, as if there could be a partial right arise from a partial expiration of the statutory period of limitation of an action, as though if the period be five years, the fact that three years have expired after the statute has commenced to run gives three-fifths of a right to plead the statute. As to this provision the right is either absolutely perfect or it does not exist at all: there is

no formative period. As was well said by the Supreme Court of Pennsylvania, in Graffius vs. Tottenham, 1 Watts & S., 488, "The moment of conception is the instant of birth."

The learned Judge, in his decision in this cause says: "Blaine County simply took the place occupied by Alturas; it assumed all its burdens, was invested with all its rights."

Section 8, above quoted, expressly confines the rights of Blaine County to "rights of action *now existing* in favor of or against said Alturas or Logan County."

Vide supra.

Can it be said that the right to plead the statute against the debt here involved existed at the time that section was enacted or any portion of such right? Had the right been possesed by Alturas at the time she was abolished, then there might be force in counsel's contention.

Counsel and the learned Judge appear to have confused the idea of "tacking," as it is understood in the matter of building up title to real estate by adverse possession, with the privilege of pleading the statute of limitations as a bar to a civil action, after the right has accrued. The difference between the two kinds of prescription is clearly shown by Angell: "Prescription, therefore, is of two kinds. That is, it is either an instrument of the *acquisition* of property, or an instrument of an *exemption* only from the servitude of judicial process."

Angell on Limitations, Sec. 2.

And this distinction is clearly made and fully discussed in Wood on Limitations (2 Ed.), Sec. 1, note 1.

The Revised Statutes of Idaho relating to adverse possession of real property, make provision for "tacking" (R. S. Idaho, Secs. 4040 and 4043); but there is no such provision in the chapter relating to the commencement of "actions other than for the recovery of real property."

R. S. Idaho, Chapter III, Title II.
Code Civil Procedure, Secs. 4050 to 4063.

Whatever rights of Alturas County Blaine may have succeeded to were existing March 5th, 1895. There was not conferred upon Blaine the privilege of asserting a right which at some subsequent period of time Alturas might have possessed if her existence had continued. Counsel overlooks the restrictive words "now existing," in Section 8, above quoted. And the learned District Judge does the same, for in his decision he says, "the same actions that might have [been] maintained by or against Alturas could be by or against Blaine."

Record, p. 26.

No doubt of that, and no doubt but Blaine, independent of this provision, succeeded to all rights of Alturas.

And in this aspect of this action we would further say, in this connection, that while the statute under discussion says, "all rights of action now existing in favor of, or against, said Alturas or Logan County, may be maintained in favor of, or against, Blaine County," it does not in any manner indicate an intention on the part of the Legislature that imposed this obligation on Blaine to allow to any person who may have a right of action against Blaine County a

less time within which to bring his action than is usually allowed by the statute of limitations for bringing an action of the same character. In our view of the matter the obligation of Blaine herein either arose by "operation of law" or is a "liability created by statute," which could be barred only in four or three years, as the case might be, from March 5th, 1895.

ACKNOWLEDGMENTS AND NEW PROMISES.

Even if there had never been created any trust relation between the debtor county and the holder of these bonds; conceding that no legislative debt was created and imposed upon Blaine County by and in the act of March 5, 1895; admitting that no obligation in this regard arose by operation of law on that date, still we maintain that this action was not barred at the time it was commenced.

The earliest day at which the statute could have begun to run, in any event, was November 1, 1891, when the bonds matured.

Record, p. 40.

But we contend that subsequent to the maturing of the bonds, and both before and after the creation of Blaine County, acknowledgments and new promises by the debtor counties interrupted the running of the statute and started new statutory periods which have avoided the bar defendant invokes. And then, too, we urge that there has been repeated legislative recognition which has had the same effect. The complaint fully sets out these recognitions, acknowledgements and new promises.

Record, pp. 51, 52, 54, 56, 57, 58, 59 and 44.

The learned District Judge was fully convinced that such had been done by the Legislature. In the decision on demurrer, speaking of the Legislature in the enactment of the law creating Blaine County, he says: "It did not in terms create a new debt, but recognized the validity of the old, and that Blaine should pay it."

Record, p. 26.

It should be borne in mind that at the time of the passage of that act, March 5, 1895, the statute had not run on the debt, but the debt was then some three years and four months past due.

If the statute had been running, which we deny, then when the acknowledgment and new promise were made the statute commenced anew for another statutory period on the contract debt, if, as the learned Judge held, no legislative debt was created.

1 Wood on Lim. (2 Ed.), p. 249.
Green vs. Coos Bay W. R. Co., 23 Fed., 67-70
Taylor vs. Slaten, 12 At., 727-729.
Brown vs. French, 22 S. W., 581-582.

Counties are public quasi-corporations entirely under the control of the legislative will, subject only to constitutional restrictions.

1 Beach Pub. Corp., Sec. 8.

"A county is a part of the State, and a county debt is part of the State debt."

Hunsaker vs. Borden, 5 Cal., 288.
City and County of San Francisco vs. Jones, 20 Fed., 188.
Darling vs. Mayor, 31 N. Y., 164.

"The date of this act [legislating a debt on a district] must be taken as the time when the debt was incurred."

Massachustts, &c., Co. vs. Township, 45 Fed., 336-337.

"The power of the State to recognize and pay a claim against itself after a lapse of any period of time cannot be questioned on any constitutional ground; and the power of the Legislature over counties in reference to such matters * * is just as broad."

County of Caldwell vs. Crocket, 4 S. W., 607-612.
New Orleans vs. Clark, 95 U. S., 644.

The validity of a debt of a county may be recognized by the Legislature so as to avoid the operation of the statute of limitations, even after the debt has been barred.

County of Caldwell vs. Crocket, 4 S. W., 607-610.

The consent of Blaine County, or any active acknowledgment or recognition of the debt by it, was not necessary to make binding on it the recognition of the debt made by the Legislature.

"The obligation to pay the debts of the district was imposed upon the town by a public law, of which all persons and corporations within the commonwealth were bound to take notice, and did not require any promise or consent of the town to give it effect."

Whitney vs. Stowe, 111 Mass., 368-372.

The term "valid and legal indebtedness," found in Section 7 of the act creating Blaine County, includes the debt here in question.

Sierra County vs. Dona Ana County, 21 Pac., 83.
State vs. Hardey, 21 Pac., 601.
Delp vs. Brewing Co., 15 At., 871.
Miller vs. Beardsley, 45 N. W., 756-757.

"An action is taken out of the statute of limitations by an acknowledgment of debt, which, though general in terms, sufficiently points to the particular indebtedness."

Hardy vs. Hardy, 28 At., 897-898.
Shipley vs. Shipley, 8 At., 355.

The acknowledgment or new promise need not be made to the creditor when "the circumstances are such as to show that the debtor intended that it should be communicated to the creditor, or that it should renew the debt, and this intention may be implied from the circumstances."

1 Wood on Lim. (2 Ed.), Sec. 79, p. 244.
De Freest vs. Warner, 98 N. Y., 217.
Whitney vs. Stowe, *supra.*
Smith vs. Ryan, 66 N. Y., 352.

The law itself is the promise in writing to all.

Again, the fact that the County of Blaine, in its complaint in the case of Blaine County vs. Lincoln County, in which Blaine recovered judgment for full amount demanded, included the bonds here before the Court, in the claim upon which it sued, in that action, is such another acknowledgment as to avoid the bar of the statute.

"There is also a class where, although the acknowledgment or promise was not made directly to the cred-

itor or his agent, yet, being made for the purpose of deriving, and having derived, an advantage therefrom, it is, in effect, held that he is estopped from setting up the statute, upon the ground that he cannot be allowed to take the benefit of the acknowledgment and then repudiate its obligation. That is, where a debtor under such circumstances derives an advantage from the acknowledgment, he is treated as having intended that it should be accepted as such, and confided in by the creditor."

1 Wood on Limitations (2 Ed.), Sec. 79, p. 245.

In a Virginia case, after an elaborate review of this question, it was held that where a maker of a note, in a deposition made by him in a case to which the payee of the note was not a party, swore that the note was an outstanding obligation against him, for the purpose of getting credit for the note as to be paid to him, and upon which he did not obtain such credit, the acknowledgment was such that the creditor could avail himself of in answer to a plea of the statute, set up to defeat an action upon the note.

Duguid vs. Scholfield, 32 Gratt., 803.

The same principle was applied when notes given by an executor to the testator, but barred by the statute, were included in the schedule of the assets of the estate made by the executor.

Ross vs. Ross, 6 Hun., 80.

Also in Winchell vs. Hicks, 18 N. Y., 558-564.

And also in Stuart vs. Foster, 18 Abb. Pr., 305, wherein it was said: "The code does not define what the writing shall be; it merely requires the acknowl-

edgment or promise to be in writing, signed by the party to be charged, and, for aught I can see, it can as effectually be made in a general assignment for the benefit of creditors as in any other instrument."

And also in Reed vs. His Creditors, 1 So., 784-789, where acknowledgment was made by an insolvent's including a mortgage in his schedule, which was approved.

In so far as the requirement of the statute relative to acknowledgments being in writing signed by the party, is concerned, in this action it is sufficient to say that Blaine County could not itself either make an acknowledgment or sign a written instrument except through and by those persons who, by law, are authorized to act for it.

The county brought the suit of Blaine County vs. Lincoln County, and in the complaint included the Court House Bonded Indebtedness; the county claimed it and the Court allowed it.

Record, p. 58.

Respecting the legislative recognition of the debt and promise to pay it, we merely say that it is well settled that in all things wherein the Constitution does not prohibit it, the Legislature has full power to bind the county, and when, by a general enactment, duly passed, enrolled and signed by the executive, the Legislature has in a statute made an acknowledgment which implies a promise, it is in the very highest form of writing and is signed by the party duly authorized thereunto, and within the meaning of the law is signed by the party to be charged. It is made to the world, and particularly to the parties interested. It is in the highest form of promise and in the nature of a specialty.

We further refer specially to a series of acknowledgments implying a promise to pay, made, some by the Legislature and some by acts of the debtor counties.

1st. The acknowledgment in the Alturas division act of 1889, before referred to and quoted.

2d. The legislative acknowledgment in the act of March 3, 1891, creating Alta County, and enacting that "all indebtedness of Alturas County shall be assumed and paid by Alta County."

Idaho Sess. Laws 1890-91, p. 120.

3d. The acknowledgment and promise of payment of Alturas County after the apportionment of the debt in 1894.

Record, p. 51.

4th. The Blaine act of March 5, 1895, above referred to and quoted from.

5th. By the amendment of Section 3606 of the Revised Statutes of Idaho, above referred to and quoted.

6th. By the act apportioning "Old Alturas Debt," passed March 9, 1895, referred to and quoted from above.

7th. By the act of March 9, 1895, giving to Custer County a portion of Blaine County and apportioning this indebtedness.

Idaho Sess. Laws 1895, p. 140.

8th. By the act of March 18, 1895, creating Lincoln County and apportioning the indebtedness of Blaine County, above referred to and quoted from.

9th. By the action of Blaine County vs. Lincoln County, wherein Blaine County claimed and has recovered judgment for Lincoln's proportion of this Bonded Court House Indebtedness, above referred to.

10th. By the action in 1897 of Blaine County vs. Smith et al., Commissioners of Bingham County, wherein Blaine County obtained judgment against Bingham County for moneys on account of and to be used in the payment of the old Alturas debt, above referred to.

We submit that if one or more of these acknowledgments was made within five years prior to the time of bringing this action, and within five years after the maturity of the bonds, then if there was no trust fund, if there was no legislative debt, if no new obligation arose by operation of law, and if we concede every point made by defendant in the Court below, still such acknowledgment would set the statute running anew from its date, and the action would not be barred.

In connection both with the trust relation sustained by the defendant county and with acknowledgments and new promises, we now call the attention of the Court to various acts of the Legislature referring to the Alturas County indebtedness, wherein acknowledgments are made that imply promise of payment and wherein aid and relief are extended to the debtor county in meeting obligations which include the duty of providing for and paying this debt.

Six years after the Court House Bonded Indebtedness was incurred, Alturas County was divide. (*Vide* act dividing Alturas County, *supra.*) Section 7 of that act (Idaho Sess. Laws 1889, p. 35) provided for the apportionment of Alturas County's debts, and expressly says, regarding this particular indebtedness, "but in apportioning the debt and bonds, they shall make no apportionment of the bonds issued for the erection of the court house."

Section 8 of the act (pp. 35 and 36) provided that for the proportionate share of the debts apportioned to each of the counties territorially benefited by the act of division, such counties should issue to Alturas County warrants in payment of the amount found due from each.

And further, Section 8 provides that "the money so received [from the several counties] shall be applied only to the payment of the present indebtedness of Alturas County or the securities into which it has been funded."

Idaho Session Laws 1889, p. 36.

Thus, while the Court House Bonded Indebetedness was left entirely upon Alturas County, still no particular debts to the liquidation of which the moneys received from the several new counties should be applied were specified. The moneyswere to be applied *only* to the payment of "the present indebtedness of Alturas County" generally, and such indebtedness included the Court House Bonded Indebtedness; as these funds could be applied *only* to such payment it became a trust fund. So far, then, as this particular debt was concerned, Alturas County was, by the terms of the division act, made a trustee for the receipt and proper application of at least a portion of the moneys received from the new counties, as much for the benefit of the holders of Court House Bonds as for any other creditor.

While the several new counties, by the terms of the division act, were not required to levy a special tax to meet the interest accruing upon their warrants issued to Alturas County, yet Alturas County was, under the law and by the terms of her contract, compelled to

meet annually the interest accruing upon the bonded indebtedness, including the Court House Bonded Debt, which the warrants were in part to pay. This was unjust to Alturas County. Recognizing this fact, the Legislature, on March 9, 1895, amended Section 8 of the division act of 1889, and, by the terms of the amendment, imposed upon the Boards of Commissioners of the new counties the duty of levying "a special tax upon all the taxable property of their respective counties in an amount sufficient to pay the interest on said warrants, and the County Assessor of each of said counties shall pay the amount of said tax over to the Treasurer of Alturas County each year and in time to enable said County of Alturas to meet the payments of interest on the funded debt of said county, as the same shall become due."

Idaho Session Laws 1895, p. 88.

Thereby the Legislature again so recognized the debt of old Alturas as to imply and make new promise of payment and recognized and emphasized the trust relation existing between the debtor county and its creditors. The county was again required, through its proper officer, to receive money and disburse it in the payment of the interest on the funded debt of the county for the benefit of the bondholders, of whom were the holders of the Court House Bonds.

We contend that the Court erred in sustaining the demurrer upon the ground that "the complaint does not state facts sufficient to constitute a cause of action," if the demurrer was sustained upon that ground.

We further contend that the statute of limitations could not be raised by demurrer in this action.

The amended complaint shows that prior to the ex-

piration of five years from the 1st day of November, 1891, the date when the bonds by their terms became due, Alturas and Blaine Counties both had acknowledged the indebtedness constituting the basis of this action, and that new promises had been made, thus, on the face of the complaint, avoiding the statute of limitations. (Record, pp. 51, 58, 54.) The question whether the bar of the statute had been avoided was one to be determined by evidence on the trial, if that question were raised by answer.

The statute of limitations cannot be raised by demurrer unless the fact that the action is barred appears affirmatively and conclusively on the face of the complaint.

U. S. vs. Brown, 41 Fed., 481–483.
Bank vs. Winslow, 30 Fed., 488.
Lemoine vs. Dunklin County, 38 Fed., 567–570.

The statutes of California and Idaho are substantially the same.

R. S. Idaho, Secs. 4050 to 4063, inc.
Code Civ. Proc. Cal., Secs. 335 to 348, inc.
Revised Statutes Idaho, 4174.
Code Civ. Proc. Cal., 430.

In California it is held that "a demurrer to a cause of action upon the ground that it is barred by the statute of limitations, can only be sustained when the pleading shows it clearly open to the objection. To uphold a demurrer for this cause the complaint should show, *not that the cause of action may be barred, but that it is barred.* When, from the pleading, the question is left in doubt, an answer setting up the plea should be resorted to."

Palmtag vs. Roadhouse, 34 Pac., 111-112.
Williams vs. Bergin, 47 Pac., 877.
Farris vs. Merritt, 63 Cal., 118.
Harmon vs. Page, 62 Cal., 448.
Smith vs. Richmond, 19 Cal., 477.

To the same effect we cite:

Walker vs. Fleming, 14 Pac., 470 (Kan.)
Hazard vs. Dillon, 34 Fed., 485-491 (N. Y.)
Stringer vs. Stringer, 20 S. E., 242 (Ga.)
Falley vs. Gribling, 26 N. E., 794-796 and 7 (Ind.)
Christian vs. State, 34 N. E., 825.
Swatts vs. Bowen, 40 N. E., 1057 (Ind.)
Com. vs. Gardner (civil), 30 S. W., 413 (Ky.)
Grounds vs. Sloan, 11 S. W., 898 (Tex.)
Cameron vs. Cameron, 3 So., 148.
District vs. Ind. District, 28 N. W., 449-451 (Iowa).

A general demurrer does not raise the question of the statute of limitations.

Revised Statutes of U. S., Sec. 914.
Barnes vs. Ry. Co., 54 Fed., 87-93.
Cross vs. Moffat, 17 Pac., 771.
Thomas vs. Glendenning, 44 Pac., 652-653.
Revised Statutes of Idaho, Sec. 4213, *supra.*
Code Civ. Procedure Cal., Sec. 458.
Brown vs. Martin, 25 Cal., 82.

The acknowledgments and new promises alleged in the complaint were made before the statute had run on the bonds, and vitalized the debt for another statutory period.

1 Wood on Limitations (2 Ed.), p. 249.
Green vs. Coos Bay W. R. Co., 23 Fed., 67-70.

Taylor vs. Slaten, 12 At., 727–729, and cases there cited.
Brown vs. French, 22 S. W., 581–582.

At common law the statute of limitations can only be interposed by plea, and could not be urged upon demurrer to the declaration, although apparent upon its face. In equity the rule was that, if all the facts which defendant would be required to prove to sustain his plea appeared upon the face of the complaint, the defendant might take advavtage of it by demurrer. We have substantially adopted the equitable mode of pleading.

Palmtag vs. Roadhouse, 34 Pac., 111–112.
Combs vs. Watson, 32 Oh. St., 235.

The ultimate facts (acknowledgements and new promises in the case at bar) avoiding the statute should be alleged in complaint, and they were alleged.

Record, pp. 43, 44, 51, 52, 54, 56, 57, 58, 59.
Zieverink vs. Kemper, 34 N. E., 250–251.
Sublette vs. Tinney, 9 Cal., 423–425.
Humbert vs. Trinity Church, 7 Paige, 197.
Humphrey vs. Carpenter, 39 N. W., 67.
Edwards vs. Bates County, 55 Fed., 436–438.

The allegation in the complaint as to acknowledgments and new promises need not aver that they were in writing.

Green vs. Coos Bay W. R. Co., 23 Fed., 67.
Gould's Pleading, Ch. 4, Secs. 43, 44, 45, pp. 177–179.
Lamb vs. Starr, 14 Fed. Cas., 1024 (Case No. 8021.)
McDonald vs. M. V. H. Ass'n, 51 Cal., 210–212.

CAUSE OF ACTION.

Does the complaint simply state a cause of action upon such portion of the original Court House Bonded Debt as is evidenced by the bonds described in the complaint? Or does the complaint state a cause of action based upon a new promise made either by the Legislature or arising by operation of law independent of statute? The learned Judge, in sustaining the demurrer, takes the ground that this is simply an action on the bonds. (Record, p. 25.) He says: "Surely this complaint, upon its face, indicates an action upon the original bonds, and not upon a debt growing out of them created at a subsequent date."

Why, then, did the pleader not follow the direction of the Code, and as each bond is a separate and distinct contract, perfect in itself, separately state as many causes of action as there are bonds? An examination of the complaint will show that in stating the original indebtedness of Alturas County, as evidenced by the bonds, the theory of the complaint is (even as to Alturas County's debt), that the claim or cause of action is for such portion of the amount of the forty thousand dollar bonded debt as was evidenced by those certain bonds and coupons.

The theory of the complaint is, first, such facts as show that on March 5, 1895, such portion of the Court House Bonded Debt as was evidenced by these bonds was then of the "valid and legal indebtedness of Alturas County." Second, such facts as show the creation of the obligation on Blaine County to pay this old debt contracted by Alturas County, whether this creation was by legislative act, or on account of the legislative act making Blaine County the successor of Al-

turas County, by operation of law. And, third, such facts as would renew the debt and start the statute running anew from date of acknowledgments and new promises implied thereby, even if, as held by defendant, no new debt or obligation was created or arose on March 5, 1895. And, fourthly, such facts as show that the statute never began to run because of the trust, the trust fund and no money ever in the trust fund.

We respectfully submit that if the original debt was by the act March 5, 1895, or by reason of successorship, merged in the obligation of Blaine County to pay, that then the complaint is sufficient. Also that if the obligation of payment on Blaine County was of a new debt then created, then the complaint is sufficient, and also that if the present obligation of Blaine County is on account of renewal of an old debt by new promises, then the complaint is sufficient; and that whichever view is taken as to the nature of the obligation, in either case the complaint would be substantially the same, because dependent on the same facts. It is a matter of deciding by what name the facts are to be called. We set forth the old obligation and the legislative acts affecting it, and it is immaterial whether the act is called a new promise or the creation of a new debt. In either light we submit the complaint would be substantially the same.

If we call the legislative acts simply recognitions of an old debt and new promises, then our pleading is correct, as it is these acknowledgments and new promises which have kept alive the original debt.

Newlin vs. Duncan, 25 Am. Dec., 66.

S. C., 1 Harrington, 204.

We quote Section 288, Angell on Lim.: "In declaring in the case of a new promise or acknowledgment, the declaration is upon the original promise. In an action of assumpsit upon a bill of exchange to which the statute was pleaded, it was objected that the plaintiff ought to declare specially on the new promise or acknowledgment. Lord Ellenborough said: 'As to the form of declaring insisted on, it is enough to say that it has never been in use, and that it is the common practice to declare on the original contract, and if the statute be pleaded, the only question is, whether the defense given by it has been waived.' In a later case, Best, Ch. J., said: 'We have every wish to give full effect to the statute. Probably the new promise ought in strictness to be declared on specially, but the practice is inveterate the other way, and we can not get over it.' When the statute is pleaded, the plaintiff may, therefore, reply the new promise, and when the pleadings assume this shape, the original promise is apparently the cause of action; but it is the new promise alone that gives it vitality, and that, substantially, is the cause of action."

But other authorities, and, apparently with reason, qualify the rule and show the marked distinction between an acknowledgment made before and one made after the statute has run upon the original debt. Mr. Wood says: "An acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period, dating from the time of the acknowledgment or promise, while an acknowledgment made *after* the statute has run gives a new cause of action, for which the old debt is a consideration. The plaintiff may in the latter case, but not in the former, declare upon the new promise."

1 Wood on Lim. (2 Ed.), p. 249.

This plaintiff may safely invoke this rule, because here the acknowledgments were made before the original debt could have been barred.

Conclusion.

In the opinion on sustaining the demurrer, the learned Judge says: "By this last act [the act creating Lincoln County, passed March 18th, 1895] it appears that Blaine County was left, composed chiefly of the territory which had, just prior to the passage of the two last named acts, constituted Alturas County." (Record, p. 24.) And again, on p. 26, he says: "Moreover, while in name Blaine County is a new party, in these transactions, in reality it is substantially the same people and territory which composed Alturas County. It is in substance the same party by another name continuing responsible for the same debt."

All this is said as ground for sustaining a demurrer which admits the allegations of the complaint, and, too, when the Court takes judicial knowledge of the provisions of the statute.

The complaint avers that at the time Alturas County was abolished it had an area of 3,652 square miles of worthless lands, a population of 576 electors, an assessed valuation of $635,561, and a debt of over $400,000 (Record, p. 55), and that Blaine County was created with 9,520 square miles, mostly good land, a voting population of 1,800 and an assessed valuation of $2,410,688. (Record, p. 57.)

The complaint also shows (Record, p. 51), Alturas claimed "to be insolvent and unable to pay, * * and that said claim was then warranted by the facts." And, on same page, the complaint shows that on ac-

count of the weak, poor and insolvent condition of Alturas County, it went before the Legislature, showing its weakness and poverty and its debts, and asked to be abolished and its territory united to territory of Logan County to form Blaine County.

We submit that the complaint, taken as a whole, and the acts of the Legislature hereinbefore referred to, clearly show that the purpose, object and effect of the Blaine Act was to create a strong, rich county, able to bear this burden of debt. The figures above given show that Blaine is not another name for Alturas, and that Alturas in no sense composes the principal part of Blaine, but, on the other hand, but a small fraction of Blaine County.

Blaine County is as distinct, independent, and different a corporation from Alturas County as it is from any other county.

As a matter of fact, if it should be contended that Blaine County, as created and as existing when it assumed this debt, was only another name for Logan County, it would be so far as area, population and wealth is concerned about three times as near the truth, for Blaine County was created mostly of Logan County. The only great inheritance she got from Alturas County was this immense debt, the very cause of its creation.

And the complaint shows that the creation of Lincoln County still left Blaine County large, strong and rich, and by the provisions of the Lincoln act Blaine was left (so far as this debt is concerned) with greater debt paying power than ever before.

Record, pp. 53, 54 and 58.

Too long we have dwelt upon the many facts which,

as it appears to us, show that the remedy of the plaintiff has not been barred and his just claim not thus lost while he patiently waited for, and relied upon, the promises of the Legislature, expecting the debtor county to place in the *Trust Fund* funds for his claim and thus fulfill the promise of its creator and justify its right and cause of existence.

How long do public officials have to refuse to perform the functions of a public office to enable the public to base a right upon their disobedience of law? For nearly four years the officers of Alturas County refused to obey the law, refused to levy the special tax to place funds in the trust fund, and it seems to be contended that by disregard of official duty and thus delaying the execution of their trust they had created some right for Alturas County which Blaine County officers could perfect by a like wicked and criminal disobedience of law and disregard of their trust.

An argument that is so powerful as to convince a moral being that a criminal disregard of duty is a mode of establishing a legal right in favor of the wrongdoer and a mode of barring a legal remedy of the suffer from the disregard may obtain a denial of justice, but, if so, the refusal should be made with the twinge of conscience exhibited on page 32 of Record: "If this were simply a question of ethics, the demurrer would be overruled, but being one of law alone it is sustained. * * * I have heard it, but I hope it will be taken to another Court for review."

If the learned Judge in contemplating the facts of this case is so shocked as to use the above language, and express the above wish, with what complacency

he will pronounce a judgment herein agreeable with ethical principles, if on this review, which he wished for, this Honorable Court can see its way clear to the decision that in this cause positive law unites with moral precept in ordering the demurrer overruled!

Respectfully submitted,

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